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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ROSALES, Defendant and Appellant.	D070072 (Super. Ct. No. SCD171537)

APPEAL from an order of the Superior Court of San Diego County, David J. Danielsen, Judge. Affirmed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Appellant Miguel Rosales was convicted of possession of a controlled substance in 2000 and was sentenced to prison. In 2004, Rosales was convicted of kidnapping, carjacking, and vehicle theft with a prior. The prison term that Rosales served in connection with his 2000 conviction formed the basis of a prior prison term enhancement (Pen. Code,[1] § 667.5, subd. (b)) imposed on Rosales in connection with his 2004 conviction and sentence.

After the electorate passed Proposition 47[2] in 2014, Rosales applied to have his 2000 felony conviction for possession of a controlled substance reduced to a misdemeanor. Rosales's petition was granted. At the same time, Rosales also sought to have the prison prior enhancement, which was based on his 2000 possession of a controlled substance conviction and was imposed in 2004, stricken. The trial court denied this requested relief.

On appeal, Rosales contends that because his 2000 conviction is a "misdemeanor for all purposes" in the wake of the court's granting of his petition (§ 1170.18, subd. (k)), the 2000 conviction cannot serve as the basis for a prior prison sentence enhancement. Rosales further contends that the rule of lenity requires application of Proposition 47

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1 Further statutory references are to the Penal Code unless otherwise indicated.

2 Proposition 47 added Penal Code section 1170.18 on November 4, 2014 (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 1, p. 70). The enactment became effective the following day (Cal. Const., art. II, § 10, subd. (a)).

retroactively to eliminate his prison prior enhancement, and that the court's failure to strike his prior prison term violates his state and federal constitutional right to equal protection.

We conclude that Proposition 47 does not apply retroactively to previously imposed section 667.5, subdivision (b) sentence enhancements once a judgment of conviction attains finality. Nothing in the language of Proposition 47 states that it applies retroactively; there is no evidence that voters intended the collateral retroactive effect that Rosales seeks; and, there is a statutory presumption that amendments to the Penal Code operate prospectively. In addition, we conclude that the court's denial of the request to strike Rosales's prior prison term under these circumstances does not violate his equal protection rights. Accordingly, we affirm the trial court's ruling.

II.

PROCEDURAL BACKGROUND

A. *The underlying conviction and prison sentence on which the prison prior enhancement at issue is based*[3]

In 2004, a jury found Rosales guilty of kidnapping (§ 207, subd. (a)), carjacking (§ 215, subd. (a)), and vehicle theft with a prior (Veh. Code, §§ 10851; 666.5). The jury also found true the enhancement allegation that Rosales had served a prior prison term (§ 667.5, subd. (b)), based on his conviction in 2000 for possession of a controlled substance, in violation of Health and Safety Code section 11377. The trial court imposed

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[3] We grant Rosales's unopposed request for judicial notice of various records related to his 2000 and 2004 convictions.

a total term of 24 years in state prison, which included a one-year term for the prior prison enhancement.

After Proposition 47 was passed and became effective, Rosales filed two petitions for resentencing pursuant to section 1170.18. In one of these petitions, Rosales sought to reduce his 2000 felony conviction for unlawful possession of a controlled substance, in case No. SCD153231, to a misdemeanor. On February 26, 2016, the trial court granted this petition, reducing the 2000 felony conviction to a misdemeanor.

In Rosales's second petition, he requested that the court reduce his sentence in the 2004 case, case No. SCD171537. Rosales asked the court to strike his one-year prior prison term enhancement that was based on his 2000 conviction in case No. SCD153231, which qualified to be reduced to a misdemeanor. The trial court denied Rosales's second Proposition 47 petition on the same day that it granted his first Proposition 47 petition.

Rosales filed a timely notice of appeal from the denial of his second petition.

III.

DISCUSSION

Rosales contends that the one-year enhancement term imposed in case No. SCD171537 is unauthorized because "imposition of a one-year prison prior enhancement under Penal Code section 667.5, subdivision (b), requires the prior conviction to be a felony, whereas appellant's prior conviction in Case No. SCD153231 is now a misdemeanor." At issue is whether Rosales is eligible for resentencing, pursuant to Proposition 47, with respect to his prior prison term enhancement because the trial court

reclassified the felony conviction underlying the enhancement as a misdemeanor under the provisions of Proposition 47.

Rosales's contention involves an issue of statutory interpretation, which we review de novo. (See, e.g., *Doe v. Brown* (2009) 177 Cal.App.4th 408, 417 ["We apply the de novo standard of review to this claim, since the claim raises an issue of statutory interpretation"].)

A. *Relevant governing law*

1. *Section 667.5, subdivision (b*)

"Section 667.5, subdivision (b) provides for a one-year enhancement for a felony conviction for 'each prior separate prison term served for any felony.' " (*People v. Torres* (2011) 198 Cal.App.4th 1131, 1149.) Section 667.5 provides in relevant part:

> "Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows:
>
> "[¶] . . . [¶]
>
> "(b) . . . [W]here the new offense is any felony for which a prison sentence . . . is imposed . . . , in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term . . . for any felony . . . ."

2. *Section 1170.18*

The passage of Proposition 47 created section 1170.18, which provides, in part, that "[a] person . . . serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition

for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing," in accordance with the reduced penalties provided for various crimes contained in the statute. (*Id.*, subd. (a).) A person who satisfies the statutory criteria shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Id.*, subd. (b).)

Section 1170.18 also provides that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application to have their felony convictions "designated as misdemeanors." (§ 1170.18, subds. (f)–(h).) Section 1170.18, subdivision (k) provides that convictions that are resentenced or designated pursuant to section 1170.18 "shall be considered a misdemeanor for all purposes," except that such resentencing shall not permit the person to possess firearms. Section 1170.18, subdivision (k) provides:

> "(k) Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6."

B. *Application*

Rosales contends that the trial court should have stricken his prior prison term enhancement because the felony conviction underlying that enhancement was reduced to a misdemeanor pursuant to Proposition 47, and the Penal Code section 667.5, subdivision

(b) prison prior enhancement "requires the prior conviction to be a felony." Rosales argues that his felony conviction underlying the prior prison term enhancement was reduced to a misdemeanor "for all purposes," and that "all purposes" must include any sentencing enhancement based on that conviction. Rosales also argues that Proposition 47 has retroactive effect, and that its "for all purposes" language was intended to apply retroactively. In addition, Rosales contends that failing to grant him the relief he seeks from the prior prison term enhancement would constitute an equal protection violation.

Rosales's arguments are not novel. After the enactment of Proposition 47, defendants began filing section 1170.18 petitions attacking previously imposed section 667.5, subdivision (b) sentence enhancements based on felony convictions that were subsequently redesignated as misdemeanors under section 1170.18. The issue in all of these cases is whether a prior prison term enhancement must be stricken if, after the judgment has become final, the prior conviction upon which the enhancement was based is reduced from a felony to a misdemeanor pursuant to section 1170.18. Cases involving this and similar issues are currently pending before the Supreme Court. (See, e.g., *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *People v. Jones* (2016) 1 Cal.App.5th 221, review granted Sept. 14, 2016, S235901; *People v. Evans* (2016) 6 Cal.App.5th 894, review granted Feb. 22, 2017, S239635; and

In re Diaz (2017) 8 Cal.App.5th 812, review granted May 10, 2017, S240888.) All of these opinions have reached the conclusion that Proposition 47 has no retroactive effect on previously imposed section 667.5, subdivision (b) sentence enhancements that were based on felonies that were reduced to misdemeanors pursuant to section 1170.18 after the judgments in those cases were final. We agree with these courts, for the reasons explained below.

1. *There is no indication that voters intended Proposition 47 to have a retroactive collateral effect*

Rosales contends that because his 2000 conviction is no longer a felony, the 2004 prison prior enhancement that was based on his 2000 felony conviction is no longer a lawful sentence. What Rosales fails to acknowledge is that at the time his prison prior enhancement was imposed—i.e., in 2004—Rosales had, in fact, been convicted of a felony for which he served a prison sentence. In fact, at the time the prison prior enhancement was imposed, Rosales met all four of the necessary requirements for the imposition of an enhancement pursuant to section 667.5, subdivision (b). The 2004 judgment, including Rosales's sentence, became final long before Proposition 47 was passed.

Rosales relies on *People v. Park* (2013) 56 Cal.4th 782 (*Park*) to assert that the text of subdivision (k) requires the striking of the prison prior enhancement. In *Park*, the Supreme Court held that a felony conviction properly reduced to a misdemeanor under section 17, subdivision (b) could not *subsequently* be used to support an enhancement under section 667, subdivision (a). (*Park*, *supra*, at p. 798.) However, the Court

recognized a distinction between retroactive and prospective application: "There is no dispute that, under the rule in [prior California Supreme Court] cases, [the] defendant would be subject to the section 667[, subdivision](a) enhancement had he committed and been convicted of the present crimes *before the court reduced the earlier offense to a misdemeanor*." (*Park*, at p. 802, italics added.)[4]

Rosales committed the felony to which the prior prison term enhancement is attached before his 2000 conviction was reduced to a misdemeanor. Therefore, relying on the reduction of his felony conviction to a misdemeanor to eliminate the prior prison term enhancement would constitute an impermissible retroactive application of Proposition 47.

Rosales also relies on *People v. Flores* (1979) 92 Cal.App.3d 461, 464, 470–474 (*Flores*). This authority does not assist Rosales. The defendant in *Flores* was sentenced to prison following his conviction for selling heroin (Health & Saf. Code, § 11352). His state prison sentence for that crime was enhanced by one year under section 667.5, subdivision (b), based on a 1966 prior felony conviction for possession of marijuana, in violation of Health and Safety Code section 11357. (*Flores, supra*, 92 Cal.App.3d at pp.

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4 The Supreme Court also emphasized the distinction between retroactive and prospective application in distinguishing cases cited by the Attorney General in briefing in *Park*: "None of the cases relied upon by the Attorney General involves the situation in which the trial court has affirmatively exercised its discretion under section 17[, subdivision](b) to reduce a wobbler to a misdemeanor before the defendant committed and was adjudged guilty of a subsequent serious felony offense." (*Park, supra,* at pp. 799–800.)

464, 470.) However, that statute had been amended in 1975 to make possession of marijuana a misdemeanor. (*Id.* at p. 471.)

The *Flores* court noted that in 1976, the Legislature enacted Health and Safety Code section 11361.5, subdivision (b), which "authorize[d] the superior court, on petition, to order the destruction of all records of arrests and convictions for possession of marijuana, held by any court or state or local agency and occurring prior to January 1, 1976." (*Flores*, *supra*, 92 Cal.App.3d at p. 471.) Also in 1976, Health and Safety Code section 11361.7 "was added to provide in pertinent part that: '(a) Any record subject to destruction . . . pursuant to Section 11361.5, or more than two years of age, or a record of a conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 which became final more than two years previously, *shall not be considered to be accurate, relevant, timely, or complete for any purposes by any agency or person*. . . . (b) No public agency shall alter, amend, assess, condition, deny, limit, postpone, qualify, revoke, surcharge, or suspend any certificate, franchise, incident, interest, license, opportunity, permit, privilege, right, or title of any person because of an arrest or conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 . . . on or after the date the records . . . are required to be destroyed . . . or two years from the date of such conviction . . . with respect to . . . convictions occurring prior to January 1, 1976.' " (*Flores*, at pp. 471–472.) Based on these amendments, the court concluded that "the Legislature intended to prohibit the use of the specified records for the purpose of

imposing any collateral sanctions," such as the prior prison term enhancement. (*Id.* at p. 472.)

Rosales acknowledges that *Flores* "is not exactly on point." We would go further and conclude that *Flores* is inapposite because unlike in *Flores*, there is no declaration of legislative intent for full retroactivity either in Proposition 47 generally, or in section 1170.18 in particular. If Proposition 47's drafters had intended to invalidate prior prison term allegations as a result of the reduction of an underlying felony to a misdemeanor, they could have included legislative language like the language discussed in, and relied on, in *Flores*. No similar language was included.

Rosales's statutory interpretation argument is also without merit. Relying on the maxim *expressio unius est exclusio alterius*, "under which 'the enumeration of things to which a statute applies is presumed to exclude things not mentioned' [citation]" (see *Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 89–90), Rosales contends that "the express exception for firearm-related offenses indicates that the voters did not intend other exceptions" to the "for all purposes" language in Proposition 47. However, the expression of a limitation as to how the misdemeanor designation is to apply once it has been established does not clearly and compellingly imply that the electorate intended to place no limitation as to *when* the designation applies in time. Further, Proposition 47's retroactivity is addressed in subdivision (a) of section 1170.18, which lists the provisions that are subject to retroactive application. That list does not include reference to prior prison term enhancements.

We also reject Rosales's reliance on Proposition 47's broad purpose "to focus prison spending on violent and serious offenses rather than misdemeanor drug possession offenses" to support his contention that his prior prison enhancement should be stricken now that the offense underlying that enhancement has been reduced to a misdemeanor. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." ' " (*Rodriguez v. United States* (1987) 480 U.S. 522, 525–526, italics omitted; accord *County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 48 (*County of Sonoma*).) Lawmakers must always decide the extent to which a particular objective outweighs competing values, and a court attempting to interpret a statutory provision should be mindful of this balance when it is spelled out in the text of a statute. (*County of Sonoma*, *supra*, at p. 48.) The general statements of purpose in Proposition 47 should not be invoked to create a retroactive application that the text of the measure otherwise does not support.

2. *The Rule of Lenity does not require that Rosales's prior prison enhancement be stricken*

Rosales's citation to the rule of lenity, "whereby courts must resolve doubts as to the meaning of a statute in a criminal defendant's favor" (*People v. Avery* (2002) 27 Cal.4th 49, 57), is of no assistance in this situation. Application of the rule of lenity is premised on the existence of an ambiguity in the statute being interpreted: " 'The rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable.' [¶] Thus, although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*Id.* at p. 58.) As we have already explained, we are convinced that Proposition 47 is not ambiguous with respect to the relief that Rosales seeks. The rule of lenity thus does not come into play.

3. *Prospective application of Proposition 47 with respect to prior prison term enhancements does not violate equal protection*

Rosales contends that the failure to strike his prior prison term enhancement as a result of Proposition 47 constitutes an equal protection violation under the state and federal Constitutions. Rosales notes that he is currently serving a prison sentence pursuant to a final judgment that includes a prior prison term enhancement that is based on a felony conviction that has now been redesignated as a misdemeanor pursuant to section 1170.18. He argues that he is "similarly situated to other defendants who were

sentenced after the enactment of Proposition 47 or who have yet to be sentenced and who have the exact same prior conviction" but, as a result of Proposition 47, will not be subject to the one-year prior prison term enhancement that Rosales is challenging on appeal.

The United States and California Constitutions guarantee equal protection of the laws. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7; see *In re Evans* (1996) 49 Cal.App.4th 1263, 1270 [the scope and effect of the two equal protection clauses is the same].) This guarantee assures that the Legislature and voters cannot adopt a classification that affects two or more similarly situated groups unequally, unless the classification has a rational relationship to a legitimate state purpose. (*People v. Brown* (2012) 54 Cal.4th 314, 328; *People v. Singh* (2011) 198 Cal.App.4th 364, 369 (*Singh*).)[5]

Rosales argues that failing to apply Proposition 47 retroactively to enhancements creates two classes of defendants: (1) those sentenced after enactment of Proposition 47, who are able to avoid enhancements based on prior felony or wobbler convictions (because the redesignations they obtain on those prior convictions apply prospectively to preclude imposition of a prior prison enhancement) and (2) those sentenced before enactment of Proposition 47, who are unable to avoid enhancements based on prior felony or wobbler convictions (because the redesignations they obtain on those prior convictions do not apply retroactively). These two classes of defendants are

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5 " ' "[I]n ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest," the classification is upheld unless it bears no rational relationship to a legitimate state purpose.' " (*Singh*, *supra*, at p. 369.)

distinguished by whether they were able to seek redesignation before or after their current sentences were imposed, which is a function of the date on which Proposition 47 took effect.

" '[A] reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection.' " (*People v. Floyd* (2003) 31 Cal.4th 179, 189 (*Floyd*).) " '[A] statute ameliorating punishment for particular offenses may be made prospective only without offending equal protection, because the Legislature will be supposed to have acted in order to optimize the deterrent effect of criminal penalties by deflecting any assumption by offenders that future acts of lenity will necessarily benefit them.' " (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1468.) Under these authorities, it is clear that denying Rosales the relief he seeks with respect to his prison prior enhancement does not deny him his right to equal protection. "[T]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time." (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505.)

In addition, applying Proposition 47 only prospectively with respect to enhancements that are based on a redesignated conviction bears a rational relationship to the legitimate state interest of *transitioning* from the prior sentencing scheme to Proposition 47's sentencing scheme. Prospective sentencing changes based on an effective date presumably recognize "legitimate . . . concerns associated with the transition from one sentencing scheme to another." (*Floyd*, *supra*, 31 Cal.4th at p. 191.)

We therefore conclude that Rosales's equal protection rights were not violated as a result of the trial court's denial of his request to strike his prison prior enhancement, which was imposed in 2004, upon the subsequent redesignation of his 2000 conviction to a misdemeanor.

IV.

DISPOSITION

The order of the trial court denying Rosales's petition to strike his prior prison term enhancement is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.